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No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, ET AL.,

Appellants,

—v.—

JEFFREY MAY, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' OPPOSITION TO MOTION FOR LEAVE TO INTERVENE AS APPELLANTS OF RONALD AND CATHERINE SOKALSKI AND TWYLLA FLANDERS

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Movants, Ronald and Catherine Sokalski and Twylla Flanders, three residents of the State of New Jersey, seek to intervene as party defendants-appellants in this action in an attempt to create jurisdiction that is otherwise lacking in order to support the New Jersey minute of silence statute, N.J.S.A. 18A:36-4 ("Section 36-4"). Plaintiffs-appellees Jeffrey May, *et al.*, oppose this motion, but, in any case, believe it could only be granted if the Court first decides that appellant Alan Karcher has standing to pursue this appeal.[1]

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1 Appellees will argue in their brief on the merits that the Court must dismiss this case because Karcher lacks standing to appeal. *See also* Appellees' Motion to Dismiss or Affirm, at 2-17; Brief for the United States as Amicus Curiae, at 7-13. This Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits. *Karcher v. May*, 93 L.Ed.2d 995 (1987).

Movants focus exclusively on whether they meet the elements necessary to intervene that are specified in Fed. R. Civ. P. 24, which presumes a valid preexisting litigation. Movants, however, ignore the underlying jurisdictional question: If Karcher lacks standing to pursue this appeal, and consequently there is no case or controversy under Article III before this Court, does Rule 24 permit these movants to intervene in an attempt to create Article III jurisdiction?[2] Appellees contend that the answer is no. First, where a court lacks jurisdiction under Article III, there is no case or controversy in which to intervene. Second, movants do not assert, nor could they assert, any claims or counterclaims that give them a separate or independent basis for jurisdiction in this § 1983 action.

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2 If this Court decides that Karcher has standing to pursue this appeal, then intervention is unnecessary because movants will be adequately represented. Appellees would not oppose the Court's treatment of movants' brief as an *amicus curiae* brief on the merits. Movants admit that they are proper *amici curiae*. *Motion for Leave to Intervene as Appellants*, at ix n. 6 ("Motion"). The only possible purpose for this motion, one which movants do not deny, is to attempt to create jurisdiction if the Court finds that none otherwise exists.

In any case, intervention is not appropriate because this motion is not "timely," as Rule 24 requires. "Timeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366 (1973). From the sparse affidavits, it is clear that movants have been aware of this lawsuit since Section 36-4 was enjoined in January 1983. For over four years they failed to act to protect their alleged interests in the statute. Had movants timely intervened in the district court, appellees could have determined the extent of the interests they allege. At this stage, appellees are forced to respond to bare-boned affidavits. At a minimum, movants should have been aware by April 1986 that the New Jersey legislature would not prosecute an appeal to this Court. Yet they waited an entire year prior to acting. This Court should discourage such disruptive and dilatory tactics.

I. INTERVENTION CANNOT CURE JURISDICTIONAL DEFECTS THAT BAR A COURT FROM HEARING THE ORIGINAL ACTION

Last term, this Court decided an issue almost identical to that raised by the movants, and reaffirmed a position it has held for over 70 years. In *Diamond v. Charles*, 476 U.S. ____, 90 L.Ed.2d 48 (1986), the Court held that an individual who had intervened below lacked standing to pursue an appeal to this Court when the State, which had actively defended the constitutionality of its statute in the lower courts, refused to appeal to this Court. "[I]n the absence of the State in that capacity [of an appellant], there is no case for Diamond to join." *Id.* at 59. No meaningful difference for Article III purposes exists between the situation in which a State refuses to appeal and the State withdraws its appeal and its purported representative (Karcher) is found to lack standing. If anything, the individual movants here present a significantly weaker claim than Diamond that individuals should be permitted to substitute for the State. Diamond had intervened below when the state was a proper defendant; his intervention was not for the sole purpose of creating jurisdiction, unlike the situation here.

The Court's words in *Diamond* are particularly apt here, where state residents attempt to create jurisdiction to defend a state statute that neither the executive nor legislative branch of New Jersey wishes to defend:

> The concerns for state autonomy that deny private individuals the right to compel a State to enforce its laws apply with even greater force to an attempt by a private individual to compel a State to create and retain the legal framework within which individual enforcement decisions are made. The State's acquiescence in the Court of Appeals' determination of unconstitutionality serves to deprive the State of the power to prosecute anyone for violating the Abortion Law. Diamond's attempt to maintain the litigation is, then, simply an effort to compel the State to enact a code in accord with Diamond's interests.

> But "the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State. . . . Because the State alone is entitled to create a legal code, only the State has the kind of "direct stake" . . . in defending the standards embodied in that code.

Id. (citations omitted).

Similarly, in *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914), the Court held that when a creditor sued prior to the time the statutory cause of action accrued, intervention by another creditor at a time when the suit properly could have been brought "could not cure this vice in the original suit," *id.* at 163-64, and the intervention "must abide the fate of that suit," *id.* at 164. *See also Pusey & Jones Co. v. Hanssen*, 261 U.S. 491, 501 (1923) (rejecting as "clearly unsound" an argument that intervention of particular party cured lack of equity jurisdiction).

The lower federal courts have consistently adhered to this position that "[i]ntervention cannot cure any jurisdictional defect that would have barred the federal court from hearing the original action. Intervention presupposes the pendency of an action in a court of competent jurisdiction and cannot create jurisdiction if none existed before." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1917 at 457-58 (2d ed. 1986) (footnotes omitted). *See, e.g., Truvillion v. King's Daughters Hospital*, 614 F.2d 520, 526 (5th Cir. 1980); *McClune v. Shamah*, 593 F.2d 482, 486 (3d Cir. 1979); *Black v. Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974); *Mattice v. Meyer*, 353 F.2d 316, 319 (8th Cir. 1965); *Cane Creek Conservation Authority v. Orange Water and Sewer Authority*, 590 F. Supp. 1123, 1128 n.7 (M.D.N.C. 1984); *ICC v. Southern Railway Co.*, 380 F. Supp. 386, 394 (M.D. Ga. 1974), *aff'd*, 543 F.2d 534 (5th Cir. 1976); *see also* 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 24.18[3], at 24-200, -206 (2d ed. 1987).

Appellees take no exception to the general principle that "this Court clearly has authority to permit a party to intervene in the first instance in this Court." Motion, at v. None of the cases cited by movants, however, are responsive to whether an intervenor can create jurisdiction that is otherwise lacking in this Court. The Rule 24 cases cited by movants, *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), *Eastern-Central Motor Carriers Assoc. v. United States*, 321 U.S. 194 (1944), and *United States v. Terminal Railroad Assoc.*, 236 U.S. 194 (1915), all involved instances in which the original party remained in the lawsuit throughout the proceedings. No questions concerning the Court's jurisdiction arose in these cases. They involved unexceptional instances in which a party intervened to protect its undisputed interests in the outcome of ongoing proceedings between the original parties. Movants cite no cases, and appellees have discovered none, in which this Court has permitted intervention under Rule 24 for the sole purpose of creating jurisdiction where none otherwise existed.

II. MOVANTS DO NOT, AND CANNOT, ASSERT A SEPARATE AND INDEPENDENT BASIS FOR JURISDICTION IN THIS § 1983 SUIT

While the law is clear that an intervenor cannot create jurisdiction when none currently exists, some lower federal courts have held that when "there is an independent basis for jurisdiction with regard to the intervenor the court has discretion to treat his pleading as a separate action in order to adjudicate the claims raised by him." 7C *Federal Practice and Procedure*, *supra*, § 1917 at 458-59 (footnote omitted) (collecting cases).[3] However, "[a]n intervenor lacking an independent

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3 Assuming that *Mullaney v. Anderson*, 342 U.S. 415 (1952), which involved the addition of parties pursuant to Fed. R. Civ. P. 21, is relevant to intervention under Rule 24, it fits within this narrow exception. The original plaintiffs in *Mullaney* were merely the agents of the added parties, and "[t]o grant the motion merely puts the principal, the real party in interest, in the position of his avowed agent." *Mullaney*, 342 U.S. at 417. The added plaintiffs had jurisdiction to initiate litigation and raise claims on their own behalf

jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction." *Simmons v. ICC*, 716 F.2d 40, 46 (D.C. Cir. 1983) (Scalia, J.); *see also Horn v. Eltra Corp.*, 686 F.2d 439, 440-41 (6th Cir. 1982).[4]

Movants do not even assert, nor could they, that there is separate and independent federal jurisdiction between themselves and the plaintiffs-appellees in this § 1983 action. First, movants are not proper defendants, because they could not have been sued by these plaintiffs. Plaintiffs initiated this action in the District Court under 42 U.S.C. § 1983. The only proper defendants in a section 1983 suit are those acting "under color of state law," *i.e.*, state officials or those participating in joint activity with them. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Thus, the New Jersey State legislature, although not named by plaintiffs as a defendant, had Article III standing to pursue this matter as defendants-intervenors in the courts below. However, no one, least of all movants, alleges that movants have acted "under color of state law" to deprive these plaintiffs of any "rights, privileges or

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separate and independent of the original plaintiffs. In addition, "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration . . . ." *Id. See Fuller v. Volk*, 351 F.2d 323, 329 (3d. Cir. 1965) (when intervenor has separate and independent basis for jurisdiction, intervention permitted if "failure to adjudicate the claim will result only in unnecessary delay").

4 One Court has held that in the unique circumstances in which a petitioner has timely filed a challenge within the requisite 60 days to a federal agency action, and in which an intervenor, after the 60-day period, timely intervened to protect its own interest, the intervenor could continue to pursue its own claims after the petitioner voluntarily withdrew from the case. *United States Steel Corp. v. EPA*, 614 F.2d 843, 845-46 (3d Cir. 1979). That court stressed that the "intervention was not an attempt to cure a jurisdictional defect. Rather, it was an explicit attempt to insure that Scott's interests, which were related but not identical to those of U.S. Steel, were adequately represented in the ongoing proceeding." *Id.* at 846.

immunities." 42 U.S.C. § 1983.[5] Thus, they cannot be proper defendants in this action, and there is no case or controversy within the meaning of Article III between the plaintiffs and those now seeking to intervene as defendants-appellants. The fact that movants seek to defend the state's statute on appeal does not alter the Article III case or controversy requirement. *Bender v. Williamsport Area School District*, 475 U.S. ____, 89 L.Ed.2d 501, 515 (1986); *see also Diamond*, 90 L.Ed.2d at 61.[6]

Second, movants do not raise any affirmative claims cognizable under Article III against these plaintiffs. It is obvious that movants could not sue plaintiffs-appellees in District Court to have section 36-4 declared constitutional.[7] *See, e.g., Keith v. Louisiana Department of Education*, 553 F. Supp. 295, 299 (M.D.La. 1982). Movants do not even attempt to explain why they should be able to raise such a claim for the first time before *this* Court. In reality, movants merely seek to substitute themselves for Karcher and his claims in the event

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5 The mere fact that Twylla Flanders is a public school teacher does not change this result. She fails to allege that any of the plaintiffs in this suit are students or parents of students in the school where she teaches and, in fact, none are. Moreover, she expressly states that she will not use a moment of silence in her class unless such a statute were in effect *and* declared constitutional. Thus, she does not threaten to deprive any persons of any rights cognizable in a section 1983 suit, nor does she even allege that anyone has threatened to sue her. Motion, at 6a. Consequently, there is no Article III case or controversy between these plaintiffs and Flanders.

6 As in *Diamond*, the motion does not present the question whether an intervenor must have an independent basis for jurisdiction when there is ongoing jurisdiction between the original parties. *See Diamond*, 90 L.Ed.2d at 62 & n.21; *id.* at 65 (O'Connor, J. concurring).

7 Movants appear to claim an unarticulated right to a minute of silence in the public schools. Such a claim is not the subject of the instant lawsuit, and was in no way litigated below. Moreover, such a claim must be asserted against the appropriate state or local officials, not the plaintiffs-appellees currently before this Court.

this Court finds he lacks standing. This they may not do, as this Court made clear last Term in *Diamond*.

Respectfully submitted,

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